91-1635

Supreme Court, U.S.
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No.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER, 1992 TERM

RONALD R. L. RENZ, Petitioner,

v.

EAGLE ASSOCIATES, A Kansas General Partnership; EAGLE ASSOCIATES II; a Kansas General Partnership, DAVID KOHLMAN; WILLIAM G. SCWEIKHARD; and PAUL A. BAKER,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether the trial court erred in denying petitioner the constitutional right to a jury trial as provided in the Seventh Amendment to the Constitution of the United States of America and afforded to citizens of the State of Kansas through Section 5 of the Bill of Rights to the Constitution of the State of Kansas?

IN THE SUPREME COURT OF THE UNITED STATE

OCTOBER, 1992 TERM

No.

RONALD R. L. RENZ, Petitioner,

vs.

EAGLE ASSOCIATES, a Kansas General Partnership; EAGLE ASSOCIATES II; a Kansas General Partnership, DAVID KOHLMAN; WILLIAM G. SCWEIKHARD; and PAUL A. BAKER.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE

TENTH CIRCUIT

The plaintiff-petitioner Ronald R. L. Renz petitions for a writ of certiorari to review the judgment of the Kansas Court of Appeals and Kansas Supreme Court in this case.

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The opinions of the Kansas Appellate Courts (App., infra A) has not been designated for publication. The district court opinion (App., infra B) is unpublished.

JURISDICTION

The judgment of the Kansas Court of Appeal was entered August 2, 1991. The Kansas Supreme Court denied review on December 19, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

RULES INVOLVED

The Seventh Amendment to the Constitution of the United States of America which states:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Section 5 of the Bill of Rights to the Constitution of the State of Kansas states, "The right of trial by jury shall be inviolate."

STATEMENT

The petitioner Ronald R. L. Renz brought suit in the District Court of Douglas County, Kansas against his former business partners individually, as well as the original partnership and the subsequent partnership created by his former partners. The District Court found that the case was equitable in nature and petitioner's demand for jury trial was denied. The Court of Appeals for the State of Kansas affirmed the District Court's findings and the Supreme Court of the State of Kansas denied review.

The original partnership, Eagle Associates, was formed to purchase and develop property purchased by the partnership. That partnership included the petitioner,

as well as the individually named respondents in this case. The property mentioned herein was the only asset held by the partnership. After the formation of the partnership, each partner experienced financial trouble at one time or another. It was suggested by the individual respondents that the partnership refinance their investment in the property in order to helf overcome their financial burdens. Petitioner was in disagreement with this suggestion. Despite petitioner's objections, the other individual members of the partnership formed their own partnership, Eagle Associates, II. This new partnership, which included the same members of the original partnership except for the petitioner, proposed that the property purchased through Eagle Associates be sold to Eagle Associates II in the amount of $225,000. Petitioner continued to voice his dissatisfaction with this arrangement, yet did agree to hire independent appraisers to evaluate the land. The

appraisers valued the land at $179,000, at which time the new partnership purchased the property at the lower price. Petitioner refused to the sell the property to Eagle Associates II, but his three partners proceeded with the sale. The petitioner refused to accept the proceeds from the transaction.

Petitioner filed suit against the original partnership, Eagle Associates, the individual partners and the newly formed partnership by petitioner's partners, Eagle Associates, II. Petitioner's suit claimed two counts of breach of fiduciary duty, conspiracy, and unjust enrichment (this count was later voluntarily dismissed by petitioner). The petitioner's request for jury trial was denied as the district court judge arbitrarily included his own finding that the suit involved a partnership dissolution. It was based upon the district court's whimsical findings that petitioner's

jury trial was denied and his constitutional right to a jury trial was violated.

The petitioner asks that this Court find the facts and circumstances of this case make it appropriate to grant this petitioner a trial by jury pursuant to his Constitutional rights set out in the Seventh and Fourteenth Amendments to the Constitution of the United States of America.

This calls upon the Supreme Court to examine the reaches of the Fourteenth Amendment to the Constitution of the United States of America.

It has long been recognized by the judicial system that an individual's right to a trial by jury should be preserved. In the case at hand, that constitutional right has been stripped from this petitioner due to the district court judge's questionable act which modified petitioner's claim to add another claim not made by this petitioner. It

is due to the addition of this claim by the judge that the petitioner was denied his civil right to a trial by jury. The Constitution of the State of Kansas affords citizens the right to a trial by jury, as does the Seventh Amendment to the Constitution of the United States of America. However, this civil right has been taken away from the petitioner in violation of the Seventh Amendment to the Constitution of the United States.

REASONS FOR GRANTING THE PETITION

Prior to the enactment of the Federal Rules of Civil Procedure, law and equity claims were separate areas of law. This required a plaintiff who's claim involved both legal and equitable remedies to file claims in each jurisdiction. The federal courts, in a response to the problem created, established what was known as the "equitable clean-up" which allowed courts to exercise subject matter jurisdiction over claims involving both legal

and equitable claims, without the right to a jury trial. Confusion arose. This Court, in an attempt to solve such confusion, held in Beacon Theaters v. Westover, 359 U.S. 500, 510 (1959), that where both legal and equitable claims are asserted in a single action, the legal claims must be determined by a jury first, if a prior court determination of the equitable claim would preclude, by collateral estoppel, a subsequent jury determination of a factual issue in the legal claim.

In Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962), the district court denied a party's demand for jury trial due to the combination of both legal and equitable claims. The court invoked the "clean-up" doctrine, holding that the legal claims were only incidental to those of equity, and set the case for a bench trial. This Court held that the district court had inappropriately applied the doctrine. Specifically, this Court stated that when there are both

legal and equitable claims, the Seventh Amendment guarantees a trial by jury to "clean-up" the equitable claims. As already explained, the only equitable claim raised by this petitioner was dismissed prior to trial in an attempt to secure his right to a jury trial. The district court judge's determination that petitioner's claim was one in equity was based on the judge's random selection of his own equitable claim.

In Ross v. Berhard, 396 U.S. 531, 538, n.10 (1970), this Court recognized the difficulties in determining the fine line between equitable and legal claims. However, the court stated, "some proceedings were unmistakenably actions at law triable to a jury." According to this Court in Ross, "the Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action." Id at page 538. This petitioner's right to a jury trial was stripped from him

based upon the arbitrary characterization of the issue involved in his claim as equitable. In Connell-Burns v. Sears, Roebuck & Co., 722 F.2d 1542, 1546 (Fed.Cir. 1983), the court stated:

> "The court, although it remains ultimately responsible for upholding the law applicable to the facts found, cannot substitute its view for that of the jury when to do so would be an effective denial of the right to trial by jury."

It is well settled that despite the clear directive of the Seventh Amendment to the Constitution of the United States, the right to a jury trial shall be preserved. Several federal district and appellate courts have struck demands for jury trials in "complex" civil cases, based upon a judge-created "complexity exception". See, In Re: Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069 (3rd Cir. 1980). Obviously, petitioner's claims was not one of complexity. It involved the deceitful actions of his

partners in the selling of the only partnership property--a strip of land.

The petitioner herein sought recovery of compensatory and punitive damages. In Laskaris v. Thornburgh, 733 F.2d 260 (3rd Cir. 1984), the court held that plaintiff's claim for compensatory and punitive damages entitled him to a trial by jury. See also, Dolence v. Flynn, 628 F.2ds 1280, 1282 (10th Cir. (1980) and Moore v. Sun Oil Co., 6365 F.2d 154 (6th Cir. 1980). Specifically, the court held that although the plaintiff's claim was based upon the same facts for equitable relief, his claim for compensatory and punitive damages entitled him to a trial by jury. Laskaris v. Thornburgh at page 263.

Based upon the cases set forth above, this petitioner should be afforded his constitutional right to a trial by jury. This Court should not allow inferior trial courts to change a cause of action from a legal cause of

action to an equitable cause of action, thereby, sua sponte, denying a litigant his or her right to jury trial. Refusal to grant this writ will have just that result.

CONCLUSION

The Constitution of the United State and of the state of Kansas guarantee civil litigants the right to a jury trial. Plaintiff propertly demanded a jury trial. The denial of a jury trial in this case must be reversed. The petition for writ of certiorari should be granted.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this ___ day of March, 1992, a true and correct copy of the above and foregoing was deposited in the United States mail, first class, postage prepaid, addressed to the following:

Mr. Jeffrey o. Heeb
842 Louisianna Street
PO Box 485
Lawrence, KS 66044-0485

_____
Steven M. Dickson

APPENDIX A

NOT DESIGNATED FOR PUBLICATION

NO. 66,073

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

RONALD R. L. RENZ,
Appellant,

v.

EAGLE ASSOCIATES, A KANSAS GENERAL PARTNERSHIP; EAGLE ASSOCIATES II, A KANSAS GENERAL PARTNERSHIP; DAVID L. KOHLMAN; WILLIAM G. SCHWEIKHARD; AND PAUL A. BAKER,
Appellees.

MEMORANDUM OPINION

Appeal from Douglas District Court; RALPH M. KING, JR., judge. Opinion filed August 2, 1991. Affirmed.

Steven M. Dickson, of Dickson & Pope, P.A., of Topeka for appellant.

Jeffrey O. Heeb, of Petefish, Curran, Immel & Heeb, of Lawrence, for appellees.

Before BRISCOE, C.J., GERNON and LEWIS, JJ.

LEWIS, J.: This is an appeal from the decision of the trial court denying plaintiff, Ronald Renz, a jury trial in his lawsuit filed against his former partners and others. The merits of the action were resolved, after a bench trial, in favor of the defendants. The merits, however, are not involved in this appeal. The sole issue on appeal is whether Renz was improperly denied the right to a trial by jury.

The controversy began several years ago with the formation by Renz and three other individuals of a partnership known as Eagle Associates. The purpose of Eagle Associates was to buy, own and develop certain real

estate in Douglas County, Kansas. The only asset of the partnership was real estate located in the city of Lawrence, which the partners had purchased on contract. The contract called for interest-only payments on the purchase price until sewer and other utilities became available to the property.

As happens, occasionally, in such ventures, what started out to be a friendly joint adventure gradually deteriorated into acrimony and ill feeling. The partnership began to experience money problems, which led to the ultimate breakup and filing of this lawsuit. Renz was on one side of the controversy, and the other three partners were on the opposite side. At one point, it was Renz who was short on funds to cover a money call from the partnership; on another occasion, it was Renz' partners who were short on money. The money problems resulted in a suggestion by the other three partners to salvage the

investment by refinancing it, but Renz refused to go along with this suggestion.

Ultimately, the parties realized that some way had to be devised to dissolve the partnership. The other three partners proposed to sell the real estate to a new partnership to be formed by them for $222,525, which would have paid Renz $74,192. Renz refused to go along with this proposal. A proposal was then made which would have allowed Renz to purchase the interests of the other three partners in the real estate. Renz also refused to go along with this proposal. The parties finally agreed to hire appraisers and to sell the land to Eagle Associates II, a new partnership to be formed by the other three partners, for the average value determined by the appraisers. Unfortunately for Renz, the appraisers so appointed valued the land at $179,000. Renz refused to complete the agreement and to sell the real estate to

Eagle Associates II for the appraised figure. The other partners, however, insisted in bringing the matter to a vote, and the Eagle Associates partners voted three to one to sell the land to Eagle Associates II for the appraised value. As might be expected, Renz was extremely upset at this development and refused to accept his portion of the sale proceeds.

Renz responded to this turn of events by suing his partners, his partnership, and Eagle Associates II. This petition alleged three causes of action which were framed as follows:

1. Count I sought damages for breach of a fiduciary duty.

2. Count II sought damages for conspiracy to breach a

fiduciary duty.

3. Count III was framed on a theory of unjust enrichment.

The trial court, after discovery was completed, concluded that, despite the allegations of the petition, the essential nature of Renz' action was partnership dissolution and that he was not entitled to a jury trial. The matter proceeded to a bench trial, which resulted in a decision for the defendants on all issues, including those issues of breach of a fiduciary duty and conspiracy to breach a fiduciary duty. This appeal followed.

The question to be resolved is whether Renz was entitled to a jury trial as a matter of right. In a case involving this question, the rules are relatively easy to state but difficult to apply. We begin with the proposition that, under our system, a trial by jury is favored and that right is to be carefully guarded. In Bourne v. Atchison, T. & S. F. Rly. Co., 209 Kan. 511, 516, 497 P.2d 110 (1972), the

Supreme Court said: "The right of trial by jury is a substantial and valuable right and should be lightly denied. The law favors trial by jury, and the right should be carefully guarded against infringements." See, Karnes Enterprises, Inc. v. Quan, 221 Kan. 596, 600, 561 P.2d 825 (1977).

The right to a trial by jury is guaranteed by Section 5 of the Bill of Rights of the Constitution of the State of Kansas, by Amendment 7 of the Bill of Rights of the Constitution of the United States, and by statutory enactments K.S.A. 60-238 and K.S.A. 60-239.

Our Kansas decisions are literally replete with statements of praise for the jury system, along with strong admonitions to guard against infringement of that right. As long ago as 1878, our Kansas Supreme Court held: "It is the duty of the courts to enforce a rigid and vigilant observance of the of the provisions of the statutes

designed to preserve inviolate the right of trial by jury, and the purity of such trials." State v. Snyder, 20 Kan. 306, Syl. § 1 (1878).

Despite the strong admonition concerning the sanctity of jury trials, all of those trained in the law are aware that one is not always entitled to the highly regarded trial by jury.

As our law has developed, a litigant's right to a jury trial under the Constitution and statutes of this state refers to that right as it existed at common law. Craig v. Hamilton, 213 Kan. 665, 670, 518 P.2d 539 (1974); Grosshans & Peterson, Inc. v. Givens, 191 Kan. 650, 652, 383 P.2d 959 (1963); Duggins v. Board of County Commissioners, 179 Kan. 101, 106, 293 P.2d 258 (1956).

At common law, there was a distinction between courts of law and courts of equity. A litigant in a court of law was entitled to a jury trial as a matter of right, and a

litigant in a court of equity was not. Although the distinction between courts of law and courts of equity was long ago abolished, this distinction must still be made to the present day in determining the right to a jury trial. This point was illustrated in Craig v. Hamilton, 213 Kan. at 670. Craig v. Hamilton involved an action to dissolve a partnership, and the defendant insisted that he had a right to a jury trial. The Supreme Court held that the action would have been one of equity at common law and that no jury trial was available as a matter of right. The court illustrated the rule to be applied:

> "Defendant also asserts he is entitled to a jury trial on the issues as requested by him as part of his answer and counter-claim. We cannot agree with that contention because equitable relief was prayed for by all parties. Interpretation of the contract, accounting, and dissolution of the partnership are not appropriate issues for jury fact-finding. Although Kansas has long since combined suits in equity and actions at law into one form of action, some of the ancient distinctions persist, one being the

> absence of right to a jury trial on issues traditionally the province of courts of equity. A litigant's right to a jury trial guaranteed by Section 5 of the Bill or Rights of the Constitution of the State of Kansas refers to that right as it existed at common law. [Citations omitted.] The issues raised by the pleadings or as modified by pretrial order determine the nature of the action, and where the issues is not one justiciable at common law, a jury trial is not available." 213 Kan. at 670.

Based on this test, certain types of cases are obviously equitable in nature and no jury trial is demandable. For instance, the Kansas Supreme Court has determined the following actions to be equitable in nature: actions seeking to have a judgment set aside for fraud, Hindman v. Shepard, 205 Kan. 207, 215-16, 468 P.2d 103 (1970); actions for accounting and dissolution of a partnership, Karnes Enterprises v. Quan, 221 Kan. at 602; Craig v. Hamilton, 219 Kan. at 670; mortgage foreclosure actions, First Nat'l Bank of Olathe v. Clark, 226 Kan. 619, 623, 602 P.2d 1299 (1979); and actions for the rescission

of a contract, Baker v. Tucker, 227 Kan. 86, 89, 605 P.2d 114 (1980).

In those cases where the nature of the action is not immediately apparent, resort must be made to determine the "essential nature" of the action. If it is essentially an action seeking equitable relief, there is not right to a jury trial. Perhaps the leading case on the right to a jury trial and how that is to be determined is Karnes Enterprises v. Quan, 221 Kan. 596. In that case, the Supreme Court laid down guidelines for use in resolving this issue as follows:

> "(1) The right of trial by jury is a substantial and valuable right. The law favors trial by jury and the right should be carefully guarded against infringement. [Citation omitted.]
>
> "(2) The constitutional right to a jury trial guaranteed by Section 5 of the Bill or Rights of the Constitution as the State of Kansas refers to that right as it existed at common law. [Citations omitted.] Judge Spencer A. Gard in Kansas Code of Civil Procedure, § 60-238, in discussing the repeal

of former statute G.S. 1949, 60-2903 and in analyzing K.S.A. 60-238 states as follows:

'There is now no general statute defining what issues are triable to a jury as a matter of right and which are not. That question is determinable on the basis of common law tradition as preserved by the Kansas Constitution, section 5 of the Bill of Rights. See Hasty v. Pierpont, 146 K 517, 72 P.2d 69, which discusses the basic principle that under the common law ap arty was entitled to a jury if the case was based on legal principles as distinguished from actions in equity. Kansas jurisprudence does not seem to have suffered any loss by the repeal of former section 60-2903.'

"(3) At common law and under the Kansas constitutional provision in a suit in equity a party is not entitled to a trial by jury as a matter of right. [Citation omitted.]

"(4) In determining whether an action is one in equity the test is whether the essential nature of the action is grounded on equitable rights and is one in which equitable relief is sought. [Citations omitted.]

"(5) The issues raised by the pleadings or as modified by the pretrial order determine the nature of the action, and where the issue is not one justiciable at

common law, a jury trial is not available. [Citations omitted.]

"Prior to the adoption of our present code of civil procedure whether or not a party was entitled to a jury trial was determined exclusively from the pleadings. [Citations omitted.] The rule which required a consideration of the pleadings alone was appropriate under our former code of civil procedure where the plaintiff was required to plead in his petition all of the facts constituting his cause of action. Under our present code of civil procedure which requires only 'notice' or 'claim' pleading, the former rule is not as workable from a practical standpoint. This was recognized in Craig v. Hamilton, [213 Kan. 665]. The rule to be applied today should be one which permits the parties to complete their discovery so that the basic issues involved in the case can be clarified and the essential nature of the action determined at a pretrial conference. It is at that stage of the litigation that the trial court should determine the issue whether a party is entitled to trial by jury as a matter of right.

"(6) The substance of the pleadings, not the form of the pleadings, determines the character of an action as equitable or legal in nature. [Citations omitted.] The fact that the plaintiff prays

> for a money judgment only is not controlling where the action is essentially one in equity. [Citation omitted.]
>
> "(7) Where a court of equity obtains jurisdiction of an action for the purpose of granting some distinctively equitable relief, the court will take jurisdiction for all purposes and determine all issues in the case so that a full, effective, and determinative decree adjusting the rights of the parties may be entered and enforced. [Citations omitted.]" 221 Kan. at 600-01.

As can be seen from the Supreme Court decision in Karnes, the question can no longer be simply determined from referring to the pleadings. Despite what the pleadings may say, the court still must determine the substance of the matter and determine its essential nature. It does so by examining the contentions of the parties after discovery has been completed. Actions which may initially have entitled the plaintiff to a jury trial as a matter of right can be come actions seeking equitable relief in which no jury trial is available.

One illustrative case is Waggener v. Seever Systems, Inc., 233 Kan. 517, 664 P.2d 813 (1974). In that case, the plaintiff filed suit for relief under the Kansas Consumer Protection act. Originally, the plaintiff had available to him two remedies. He could recover damages for breach of contract or he could demand a rescission of the contract. At the pretrial conference, the plaintiff elected to proceed on a theory or rescission. The effect of that election was to deny him a jury trial. The Supreme Court said:

> "If Waggener had affirmed the contract and requested damages, he would have been guaranteed by Section 5 of the Bill or Rights of the Constitution of the State of Kansas a jury trial since the remedy existed at common law. Waggener chose to disaffirm and rescind the contract. Rescission is a suit in equity and a party is not entitled to a jury trial as a matter or right. When Waggener modified his claim from affirmance to rescission, the issue was not one justiciable at common law; a jury trial was not available" 233 Kan. at 523.

In In re Petition of the City of Moran, 238 Kan. 513, 713 P.2d 451 (1986), the Supreme Court held at Syl.§ 1 provided the following rule:

> "The procedure for obtaining a declaratory judgment (K.S.A. 60-257) provides for the right of a jury trial in the same manner as provided by K.S.A. 60-238 and 60-239. Therefore, the right to a jury trial in an action for declaratory judgment is not absolute. It must first be determined whether the action is equitable in nature or one at common law. In determining whether an actin is one in equity, the test is whether the essential nature of the action is grounded on equitable rights and is one in which equitable relief is sought."

The authorities reviewed above advise that, if the essential nature of the suit filed by Renz was equitable in nature, he was not entitled to a jury trial. We must determine whether his action was grounded in equitable rights and whether he was seeking equitable relief.

After discovery had been completed and during the hearing on a motion for summary judgment, the trial court

in the instant matter concluded that the essential nature of Renz' lawsuit was a partnership dissolution. Craig v. Hamilton, 213 Kan. 665, establishes that partnership dissolutions are matters of an equitable nature and one i snot entitled to a jury trial in such an action. After a careful review of the record, we have concluded that the trial court was correct in its determination.

There is not question but what the petition filed by the plaintiff did not seek, in its allegations, a dissolution of Eagle Associates. It is not possible from mere reference to the petition of the plaintiff and the allegations of that petition to determine that plaintiff's action was basically one for a partnership dissolution. However, the court looked beyond the allegations of the petition to the basis of the action and its primary purpose. This examination revealed an action filed by a partner against his partners claiming that he had not been treated fairly in the

liquidation of the partnership's only asset. This action certainly has all of the elements of litigation involving the liquidation of the partnership of Eagle Associates. The parties to the action are all associated with the partnership, and the subject matter of the action and the basis of the relief sought are the value of the partnership's only asset.

Despite what the petition may have alleged, the core or central issue of plaintiff's complaint was the valuation of the only asset of the partnership. This was admitted by counsel for plaintiff in a discussion with the court"

> "THE COURT: Well, there is really only one issue, that's the value of the property.
>
> "MR. DICKSON: That's the basis of this case. It's not the basis of the legal theories, but it is the basis of the case, Your Honor, you're correct. (Emphasis added.)

"THE COURT: And would you not agree this was an Article 14 termination of the partnership?

. . .

"MR. DICKSON: I'm not certain, Your Honor. I frankly don't know the answer to that question.

"THE COURT: ...How is there anything more in this case than whether the value is fair or not?

"MR. DICKSON: As a central issue of fact, that's the main central issue of fact, but it is an issue of fact. And I believe that issue of fact should preclude Summary Judgment in this case.

. . .

"THE COURT: He agreed to the appraisal, he agreed to the appraisers, and he agreed to the instructions given to the appraisers, didn't he?

"MR. DICKSON: He agreed to all of that, Your Honor. That's in writing.

. . .

"THE COURT: That's what you really want to talk about, the fairness of the appraisal.

"MR. DICKSON: That's exactly right. [Emphasis added.]

"THE COURT: Well, it looks to me like what you are down to is an equitable matter involving the liquidation of the partnership. . .

. . .

"THE COURT: . . . We're back to the question of liquidating the partnership and whether or not the amount they got is a fair value, which is the question that you want to litigate, is that not right?

"MR. DICKSON: Yes, Your Honor.

"THE COURT: Well, I think the essence of this whole case is the liquidation of the partnership. And that's an equitable action. We do have the unjust enrichment claim, which is really the essence of the partnership liquidation question, which leads to the question of whether or not the value of the real estate was fair or not. Those are equitable matters; those aren't jury matters. This is a matter that will, therefore, be tried to the Court."

There is no serious question but what the trial court had the authority, sua sponte, to determine that the action of the plaintiff was essentially one involving equity and to determine that the case should be tried to the court. See Karnes, 221 Kan. at 600; Hindman v. Shepard, 205 Kan. at 215-16.

It appears to be beyond question that the primary purpose of the plaintiff's lawsuit was to litigate the question of the value of partnership assets which were involved in the liquidation of the partnership of Eagle Associates. This being the case, the matter was one equitable in nature and no demand for a jury trial could be made as a matter of right.

The plaintiff's principal argument is that his petition set forth causes of action that were justiciable at common law and that he was entitled to a jury trial. We agree that the petition of the plaintiff sets forth at least

two causes of action justiciable at common law. However, we believe that plaintiff has issued the point of Karnes and decisions of its ilk. The allegations of the petition are not longer the only source for deciding the issues involved. The court has the obligation to pierce those pleadings and to determine the heart and essential nature of the action.

In the instant matter, the court determine, after discussion with counsel for the plaintiff, that the essential nature of the plaintiff's lawsuit involved the liquidation of the partnership of Eagle Associates. We believe the court was correct, and we affirm the trial court's decision denying a jury trial in the matter under consideration.

Affirmed.

APPENDIX B

IN THE DISTRICT COURT OF DOUGLAS COUNTY, KANSAS

Ronald R. L. Renz,

Plaintiff,

vs. Case No. 89 C 640
Division No. I

Eagle Associates, a Kansas General Partnership, Eagle Associates II, a Kansas General Partnership, David L. Kohlman, William G. Schweikhard and Paul A. Baker,

Defendants.

Proceeding Under K.S.A. Chapter 60.

JOURNAL ENTRY

NOW on this 16th day of October, 1990, at the conclusion of evidence and trial of this matter, the Court enters its findings and judgment as follows:

Renz filed suit against his three former partners, Kohlman, Baker and Schweikhard. They were together

then as Eagle Associates, a Kansas general partnership. He asks for a money judgment of $102,968.00 on the theory of breach of fiduciary duty, conspiracy to breach fiduciary duty, and unjust enrichment (see the pretrial questionnaire). The defendants filed a Motion for Summary Judgment, filing most of the exhibits offered in trial today. The plaintiff resisted that motion, arguing a disputed fact and whether there was a contract by which the plaintiff, Renz, was bound to sell at the appraisers' price. I denied the Motion for Summary Judgment, feeling there might be disputed issues of material fact about the agreement to sell the only asset of the partnership, the two lots in question. I further noted that this appeared to be a liquidation of the partnership under Article 14 (see Exhibit) which is the articles of the partnership or the partnership agreement. And the only argument was the value to be put on the real estate and

the ernest of the appraisal. And at least the latter statement, counsel for plaintiff agreed (page 24 and 25 of the transcript of the oral argument). I further noted that if the question was liquidating the partnership and whether or not the amount a partner got was a fair value (pages 31 and 32 of that transcript), then the essence of the matter before the Court was liquidation of the partnership, and that was an equitable action. And it flowed with the unjust enrichment argument as to the defendants, although I could see no fact suggesting breach of fiduciary duty, as the plaintiff was kept advised at all times of what the process was, whether he agreed or not, and therefore, no conspiracy to breach fiduciary duty. I did tell counsel for the defendant he should prepare for those issues, because questions of law can be litigated by the plaintiff along with equitable actions.

At the beginning of trial today, plaintiff indicated there would be no claim to legal theories today and he dismissed his cause of unjust enrichment. After I ruled we would continue with the equitable action, would continue as an equitable action, that is to say without a jury, I invited the plaintiff to couple any claim for legal damages with his other arguments, as well as his claim for unjust enrichment, which he had dismissed. But I felt that he ought to include it in his arguments today.

Having said all that, it seems that the case put on was all there was, with the exception of proof of damages and legal fees incurred, and we apparently litigated unjust enrichment, or at least fair value of the real estate from which that argument would flow. This is a long prologue, or was a long prologue.

The parties in 1985 purchased the lots in question for 150 to $160,000.00 by contract of sale under which

payments of principal would not be made until 15th Street was in with sewers and utilities, but the purchasers would pay interest on the total purchase price. There was a call for funds in the amount of $3,900.00 for interest and $9,600.00 for specials. Either on this or a subsequent call for funds, I don't remember which now, the plaintiff was not able to pay his share and the partners negotiated an extension of one year from the seller, still paying interest on the principal amount. At the end of that year others were not able to pay, but the plaintiff could. He wanted to pay for them, diluting their ownership in the partnership under the partnership agreement. The other three did not agree. They wanted to now refinance the original contract, which was a one third, one third, one third principal payment arrangement over a period of three years. They obviously wanted some some longer

term financing. The plaintiff would not agree to that financing; he thought that schedule was fine.

I need to digress for a minute. Let me say a word about these litigants. All four of these partners are bright, well educated, with lots of postgraduate education. They are not just average folk.

The three defendants got defensive at the attempt to dilute their interest, but they did not force refinancing, as they could have under the partnership agreement. Instead, what followed was their attempt to be fair and it is well documented by the exhibits. We're now at March 3, 1988, Exhibit A. In substance it says, one, stay with us and support our partnership by signing the personal guarantee at the Lawrence National Bank, which is willing to finance this; and two, we'll set a fair value on the land for sale or partnership valuation. Then follows Alternatives 1,2, and 3. I'm not going to try and read the

exhibit into the record. It's there for all to see. Then follows Alternatives 1, 2, and 3. One was refinance, which the plaintiff refused. Two, we'll make you a reasonable offer on March the 7th. On March the 7th an offer was made, $28,000.00 to buy out or sell, and by Exhibit B the plaintiff refused to sell and he refused to buy with regard to the March 7 offer. he said, I'll wait for Alternative No. 3, the first part of Alternative 3, which is little i, liquidating the partnership, fair value for the land. On March 28 there was another meeting with all four of them. An offer was made by the new partnership, that is the three old partners, in the amount of $222,525.00. Renz, the plaintiff, rejected this price, which would have netted him about $74,192.00. Let me correct myself. Alternative 1 was the refinancing. That was the one what was not agreed to. And then Alternative 2 was the reasonable offer to be made. Now we're down into Alternative 3

small i. May be that's what I said. In any event, small i was, the partnership would offer a fair value for the land. And on March 28th, there was another meeting of all four. There was that offer; Renz rejected it. We then reach what -- I like this phrase -- partnership impasse, I think Mr. Heeb called it. Three small double i was, if the amount was accepted, then they would have a deal. But with partnership impasse we moved to 3 triple i, the appraisal procedure established to determine the sales price, then sell to new partnership, then partnership accounting. This language is significant. This is to determine a sales price for the land, it says, and once a sales price is established, it will be sold to the new partnership. The plaintiff, Renz, actively participated in the appraisal procedure. He even says so in his affidavit from the Motion for Summary Judgment, and the facts bear him out, I agreed to proceed with the appraisal

procedure. In the course of this active participation, he gave a definition for reasonable value to use. HE got this from the Federal Home Loan Bank Board standard, and I assume that with his wife working there he had some help in getting that definition. He also actively selected Gene Hardtarfer as one of the appraisers and agreed on Bob Stephens as the appraiser that the two sides would agree upon. Larry Hatfield was the appraiser selected by the three partners. he signed off on the letter of instructions to the appraisers, who were not told that somebody was buying or selling at fair price. They was just told that partners were restructuring their partnership.

In conveying the instructions to the appraisers, Baker, though mentioning the correct lots, sent plat 2 and 3, sent a plat of lost 2 and 3 to explain the lot split and swap with Hall-Kimbrall, and the appraisers appraised lots two and three. Then, upon having the error called to their

attention, they reappraised the lots, the correct lots owned by the partnership, charged another $100.00 for extra copying costs, although I noticed the language was rather delicate, "If you agree." Their appraisal value was $179,000.00, using the market value approach (see Exhibit "H"). And the three partners sold to their new partnership, as per triple i. The sum is obviously less than everyone thought the property was worth. Perhaps not an unusual occurrence int he field of real estate. It's about what they paid for it. plus the specials to date, to that date.

Renz, having agreed with 3 triple i procedure to establish sales price, then had second thought, hindsight, but he is bound by his agreement unless there is something wrong with the appraisal. Plaintiff, Renz, educated himself quickly as to real estate appraisals. He had, in fact, had some experience in appraising aircraft, so

he found this to be an extension of that, and actively began learning what you do. He found much fault with the appraisal. I must say that I do not . These three appraisers are among a pool of six or seven local appraisers who have testified many times in each of our divisions, trying condemnation cases and other cases involving values of real estate. There is no evidence that there was any improper contact with them by anyone regarding this case. I gather, in fact, that this was a pretty routine job. They found comparables close by, were able to adjust for time lapse and came up with a square foot value. They even threw in some front foot values along with their comparables. And interestingly enough, ended up in the ballpark with a lot adjoining on the other side that sold at about the time of the appraisal, about which they didn't even know. A careful reading of their report and listening to their testimony tells me that they

considered everything they should have considered, including a real estate tax valuation that was significantly lower than the sales price. This case was two years old for them when they came in here yesterday and today. They came to Court not having reread their report, yet they were careful to say that they could not remember , when they could not remember. I think we must remember that they were not preparing for a lawsuit when they went out there. This was one of many appraisals for them and the fact that they don't remember a whole lot about it, frankly, makes their testimony, in my eyes, more credible, in that no one said, "Hey, this is a big deal, we're going to sell for this price; there may be a lawsuit." This was a purely routine thing for them. There is nothing sinister in their getting the wrong lot the first time; it's just on the other side of lot 2. I've explained what I think is the reason for the mistake. I find their appraisal price is fair and that

was the actual value of the property and the sales price under 3 triple i was properly reached.

I don't blame the plaintiff, Renz, for being upset. He left some $18,509.00 on the table in turning down the $225,525,00 offer, but if he hadn't, the other three would have paid too much. The fact that they all listed the property at one time for a higher figure really has no relevance, particularly. No real estate person testified that was the value then or how that translated into a 1988 price. Everything the three partners did was open, documented in writing to the plaintiff. There was no fraud, no conspiracy to commit fraud, just four people who couldn't agree, who reached an impasse and didn't know what their property was worth. And this is important. Even if the plaintiff had not agreed to this particular 3 triple i and there was no contract as to how to reach a fair sales price, the methodology that the other

three partners developed, in my mind, was without fault. They acknowledge they didn't know the value; they hired three appraisers to go out and appraise it and they accepted their value. The sale price was fair. I note that they could have continued under the partnership agreement to dissolve in this fashion without the plaintiff's agreement.

I therefore grant judgment in favor of the defendants with costs assessed to the plaintiff.

_____

Ralph M. King, Jr.
District Judge

APPENDIX C

IN THE SUPREME COURT
OF THE STATE OF KANSAS

RONALD R. L. RENZ,
Appellant,

vs. No. 91-66073-AS

EAGLE ASSOCIATES, A Kansas
General Partnership,
EAGLE ASSOCIATES II,
A Kansas General Partnership,
DAVID KOHLMAN, WILLIAM G.
SCHWEIKHARD and PAUL A. BAKER,
Appellees.

You are hereby notified of the following action taking the above entitled case:

Petition for Review by Appellant, Ronald R. L. Renz. Denied.

Date: 12/19/91.

Yours Very Truly,
Carol G. Green
Clerk, Supreme Court